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CERTIFICATE OF DIVISION.

SUPREME COURT OF THE UNITED STATES.

No. 354.

THE NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY, APPELLANTS,

vs.

THOMAS DUNHAM.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 8, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 354.

THE NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY, APPELLANTS,

vs.

THOMAS DUNHAM.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

1 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy, the fifteenth day of said May happening on a Sunday:

Before the Honorable Nathan Clifford, associate justice, and the Honorable George F. Shepley, circuit judge.

THE NEW ENGLAND MUTUAL MARINE INSURANCE Company, respondents, appellants,
v.
THOMAS DUNHAM, LIBELLANT, APPELLEE.

2 This is a libel on a policy of marine insurance, dated at Boston, on the second day of March, A. D. eighteen hundred and sixty-three, whereby the said insurance company, a corporation established by law in & by the authority of the State of Massachusetts, agreed to insure the said Thomas Dunham, a citizen of the State of New York, in the sum of ten thousand dollars, for whom it might concern, on a vessel or barque called the "Albina," for one year from February the twentieth, in the year eighteen hundred sixty-three, at noon, against the perils of the seas and other perils in the said policy mentioned; and the libellants alleged that within the term of one year aforesaid the said vessel was run into by another vessel on the high seas through the negligence and fault of those navigating the said other vessel, and sustained much damage, and that they expended large sums of money in repairing the same, of which they claimed payment of the said insurance company.

This case coming on to be argued at this term, the following question

was raised and argued, on which question the opinions of the judges were opposed:

Has the district court of the United States for the district of Massachusetts, sitting in admiralty, jurisdiction to entertain the libel in this case, the same being a libel in personam on a policy of marine insurance to recover for a loss?

Whereupon, on motion of the proctor for the libellants, it is ordered that the foregoing statement of the pleadings and opposition of opinion of said judges upon the question stated be certified, under the seal of the court, to the Supreme Court of the United States, at their next session to be held hereafter, to wit, on the first Monday of December, in the year of our Lord eighteen hundred and seventy.

[SEAL.] NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

[SEAL.] GEORGE F. SHEPLEY,
U. S. Circuit Judge First Judicial Circuit.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of a certificate of division of opinion on file and of record in said entitled cause, pending in said circuit court.

In testimony whereof I hereunto set my hand, and affix the seal of said circuit court, this ninth day of November, A. D. 1870.

[SEAL.] JOHN G. STETSON, *Clerk.*

(Indorsed:) No. 354. The New England Mutual Marine Insurance Company, appellants, vs. Thomas Dunham. Massachusetts C. C. U. S. Certificate of division. Filed 8th December, 1870.

Supreme Court of the United States.

DECEMBER TERM. 1870.

No. 000.

THOMAS DUNHAM

vs.

NEW-ENGLAND MUTUAL MARINE INSURANCE CO.

SAME

vs.

EQUITABLE INSURANCE CO.

BRIEF FOR RESPONDENTS.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 000.

THOMAS DUNHAM

vs.

NEW-ENGLAND MUTUAL MARINE INSURANCE CO.

SAME

vs.

EQUITABLE INSURANCE CO.

BRIEF FOR RESPONDENTS.

BOSTON:
PRESS OF RAND, AVERY, & FRYE, 3 CORNHILL.
1870.

SUPREME COURT OF THE UNITED STATES.

No. ——

DECEMBER TERM, 1870.

THOMAS DUNHAM *v.* NEW-ENGLA ND M. M. INS. CO.

SAME *v.* EQUITABLE INS. CO.

BRIEF FOR RESPONDENTS.

THESE are Libels in Admiralty upon insurance policies.

While the cases were pending in the Circuit Court, upon appeal from the District Court, a motion was filed to dismiss the cases for want of jurisdiction; and the causes now come before this Court upon a certificate of disagreement of opinion between the judges of the Circuit Court upon the question of jurisdiction.

The Constitution of the United States delegates to the judicial power of the Government cognizance of "all cases of admiralty and maritime jurisdiction."

Does the clause, "All cases of admiralty and maritime jurisdiction," comprehend policies of insurance? This is a question of construction. In 1815, Mr. Justice Story held in Delovio *v.* Boit, 2 Gallison, 398, that a policy of insurance is within this jurisdiction. The doctrine of this case has never been affirmed outside the District of Massachusetts, *but has been frequently questioned.* Its unsoundness has even been intimated in the Circuit Court for Massachusetts, though, for special reasons, it has been adhered to. The question may still be regarded as an open one, and yet to be settled by adjudication.

In determining the true interpretation of this clause of our Constitution, we shall, for the sake of convenience, make the case of Delovio *v.* Boit the division-point in our argument, and consider, first, the extent of the admiralty jurisdiction in this country, as it existed prior to the date of that case, and as understood by the jurists and statesmen who framed the Constitution; and we shall next inquire whether the doctrine of Delovio *v.* Boit was warranted by the settled law and practice of the admiralty of this country either before or after the Revolution, and how far this doctrine has been sustained by the subsequent adjudications of our courts, and whether it should still be adhered to as sound in law.

I.

A policy of marine insurance is not a *maritime contract* within the meaning of that clause of the Constitution which delegates to the judicial power of the United States cognizance of "all cases of admiralty and maritime jurisdiction."

1. Because this clause is to be construed with reference to the restricted jurisdiction of the admiralty as recognized both in this country and England at the time when the Constitution was adopted.

1 Kent's Com. 377.
1 Curtis's Com. 33.
The Schooner "James and Catherine," 1 Bald. 544 (Penn.).
The Commanders and Owners of three Brigs, 1 Dallas, 98. (Year 1784.)
The Steamboat "Magnolia," 20 How. 310, 311, 329, 331.
"The Genesee Chief," 12 How. 455, per Ch. J. Taney.
Cunningham et al. *v.* Hall, 1 Clifford, 43, 51, 52.
The Propeller "Young American," 1 Newberry, 105.

And admiralty has never claimed jurisdiction over insurance in England.

Am. Jurist, Jan. 1841, per Mr. Curtis.
2 *Arnould on Ins., Perkins's Ed.* (2*d*) 1259.
2 Brown's Civ. and Adm. Law, 82, 83, 188.
Marshall's Law of Mar. Ins. 5th Ed. (Shee's), 542.

In pursuance of the Stat. 43 Eliz. ch. 12, a court was erected in England having special jurisdiction over *policies of insurance*, called "*The Court of Policies of Insurance.*"

Blackstone's Com. 2 *Vol. p.* 58.

2. The decisions of the American Courts at the period of the Revolution, and immediately after, conclusively prove the restricted jurisdiction of admiralty as fixed by the Constitution.

In L'Arina *v.* Manwaring, Bee's Adm. 200, in the year 1803, Judge Bee said, —

"Bills of lading, *policies* of *insurance*, and bottomry bonds, where the vessel is not hypothecated according to the marine law, *are all suable at common law only.* Yet these contracts are all more or less connected with a voyage."

So in Dean *v.* Angus, Bee's Adm. 375, 376, per Hopkinson J., Penn., as early as 1785, the same is intimated.

So in "The Two Friends," Bee's Adm. 435, per Judge Bee, in the year 1786, it was held that admiralty extended only to maritime causes, and did not embrace "*any transactions or contracts which arise on land.*"

So again in 1784, it was held in Pennsylvania that admiralty jurisdiction was confined to "*things done upon the seas.*" 1 Dallas, 98. A shipwright could not sue in the admiralty.

Clinton v. The Brig "Hannah" and Ship "Gen. Knox,"
Bee's Adm. 419, per Hopkinson (1781).

This case is cited with approbation in *Cunningham v. Hall*, 1 Clifford, 43, where it is held that the admiralty jurisdiction under the Constitution must be determined by reference to the "usages" and decisions of the Courts at the time when the Constitution was formed; *which decisions are herein cited.*

Material men could not sue in admiralty.

O'Hara *v.* Ship "Mary," Bee's Adm. 100, per Bee, J.
(Year 1798.)

Nor could contracts for necessaries be sued, if furnished before the voyage was begun.

Bee's Adm. per Hopkinson, 345 (1785).

Nor ramsom bills.
Nor charter parties.

Bee's Adm. 375, Hopkinson (1785).

Nor was there any jurisdiction over cases of hypothecation, where the hypothecation took place before the commencement of the voyage, *not even if the ship was hypothecated for necessaries without which the ship could not proceed to sea.*

Turnbull *vs.* The Ship "Enterprise," Bee's Adm. 345.
Johnson *vs.* Shippen, 2 Raym. 982.

Nor could a master sue for his wages; nor a physician, for his services on a voyage.

1 *Peters's Adm.* 223, *Penn.* (1806).

This last case limits the jurisdiction to such claims as are either of themselves, or in their origin, *liens* on the ship. This was the rule which Judge Peters said he always observed in determining whether a given case was within the jurisdiction.

But certainly such a rule could not apply to policies of insurance; for they *create no lien.*

Suits *in personam* were not entertained at all in the admiralty at the period of the Revolution, except as incidental to suits *in rem;* seamen's wages excepted, which were always favored.

Ramsay v. Allegre, 12 Wheaton, 614, 622.

And Mr. Justice Johnson in that case held that the doctrine should still be maintained.

The above-cited cases are the decisions of Judges Bee, Hopkinson, and Peters, all Revolutionary men, and who were well acquainted with the limits of the admiralty jurisdiction as understood by the jurists and statesmen who framed the Constitution.

Wheaton, 625, 626. Mr. Justice Story cites Stevens *v.* Sandwich in support of his doctrine in Delovio *v.* Boit; but *it decides nothing with reference to insurance.*

4. The extension of admiralty jurisdiction is in abridgment of trial by jury, so carefully guarded by the Constitution. The encroachments of the admiralty were among the grievances of our Revolutionary fathers. Is it reasonable, therefore, to suppose, that, after they had achieved their independence, they would have formed a Constitution which guaranteed the very thing they before complained of? See address by the Continental Congress, Oct. 21, 1774, to the people of Great Britain, drawn by John Jay, afterwards Ch. J. of the United States; also *Waring v. Clarke*, 5 How. 484; *Bains v. Schooner "James" et al. C. C.* 1 Bald. 544, 550, 551.

From the foregoing authorities, the true construction of the admiralty clause of the Constitution is obvious.

Insurance was clearly not within the minds of the framers of the Constitution, nor within the acknowledged scope of the admiralty courts of that period, either before or after the Revolution.

II.

1. The doctrine of Delovio *v.* Boit, 2 Gallison, 398, so far as it pertains to policies of insurance, is unsound, and was not warranted by the precedents of the admiralty, either in this country or England. In the whole of that very lengthy decision, Mr. Justice Story does not adduce a *single* authority or case, either from the Vice-Admiralty Colonial Courts, or from the decisions subsequent to the formation of the Constitution, which directly goes to support the doctrine he maintains, that a policy of insurance is within the admiralty jurisdiction. The decisions to the contrary are unmentioned. He relies chiefly upon the general language of the Vice-Admiralty commissions, in which policies of insurance are not named.

The only instance where insurance is mentioned as within the jurisdiction is in certain commissions issued during the period of Richard II. In the absence of any later authority, Mr. Jus-

tice Story undertakes to refer the jurisdiction of this country to that period, prior to the restraining statutes of Richard II. But upon the authorities this view is untenable, if not unreasonable. *Taylor v. Carryl*, 20 How. 615, 616, per Ch. J. Taney, and cases before cited.

2. The doctrine of Delovio *v.* Boit has never been affirmed outside the first Circuit, but has frequently been questioned in the Supreme Court of the United States, and by some of the judges expressly denied. It should also be remarked, that Judge Davis, who had a large experience as an admiralty judge, dismissed the libel in the District Court for want of jurisdiction, as appears by the record, although this is not stated in the decision.

In Ramsay *v.* Allegre, 12 Wheaton, 614, 622, 638, year 1827, Mr. Justice Johnson, in referring to Delovio *v.* Boit, said, that a contrary decision had been made in the sixth circuit, and that they must both fall together, as *nisi prius* decisions were of no weight in the Supreme Court.

In Waring *v.* Clarke, 5 How. 461, 467, 1847, the question of jurisdiction came up, and Justices Woodbury, Daniel, and Grier dissented in favor of a *limited jurisdiction.*

In Jackson *v.* Steamboat "Magnolia," 20 How. 335 (1857), Mr. Justice Campbell says *he thinks he speaks the universal opinion of the legal profession in saying that the judgment in Delovio v. Boit was* "ERRONEOUS."

So also in *Taylor et al. v. Carryl*, 20 How. 615 (1856), Ch. J. Taney, in pronouncing his opinion in regard to admiralty jurisdiction, and referring to a note in 1 Kent. Com. 371, 372, said, —

"I think it is stated too broadly, broader than this court has sanctioned; *for, as regards the jurisdiction in policies of insurance, I believe it has never been asserted in any circuit but the first, and certainly it has never been brought here for adjudication.*"

In *Cutler v. Rae*, 7 How. 729, the case of Delovio *v.* Boit is *virtually overruled.* This was a libel *in personam*, filed against the consignee of goods by the owner of the vessel for contribution by way of general average. The ship was run ashore to save lives; but the cargo was saved, and delivered to the con-

signee. Taney Ch. J. held, that, by parting with the goods, the lien was lost; and the libel was dismissed for want of jurisdiction.

If put upon the ground of *lien*, as intimated, there could then be no jurisdiction over a policy of insurance where no lien exists.

This doctrine of *lien* was laid down by Judge Peters. 1 *Peters, Adm.* 223.

In *Gloucester Ins. Co. v. Younger*, 2 Curtis 333, Mr. Justice Curtis refers to the case of *Cutler v. Rae*, last cited, and says it goes pretty far towards overruling Delovio *v.* Boit; and although he adhered to the latter case in deciding the case before him, for special reasons, yet he intimated a doubt whether the doctrine would be sustained in the Appellate Court.

Nor is there jurisdiction in admiralty to enforce payment of a mortgage upon a ship. Jackson *v.* Steamboat "John Jay," 17 How. 399. Wayne, J., said, "that such a contract had nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. See 2 Wood. and Minot, 93, to same point.

So a libel *in personam* against the owners of a steamboat in California, by their agent, for balance of account due for supplies and repairs, was dismissed for want of jurisdiction.

Minturn v. Maynard, 17 How. 477.
Vandewater v. Mills, 19 How. 82.

Grier, J., said, "There is nothing in the nature of a maritime contract in the case."

In "*The General Smith*," 4 Wheaton, 438, Story, J., incidentally held that material men might sue *in personam*. But this is not settled law in this country. In 12 Wheaton, 611, this question came before the court; but the court expressly waived any decision upon it, and Mr. Justice Johnson unequivocally denied the doctrine.

So also in *People's Ferry Co. of Boston v. Beers et al.*, 20 *How.* 393, the dictum in "The Gen. Smith" is virtually overruled, and Catron, J., holds that shipwrights cannot sue in the admiralty, and cites the opinion of Judge Hopkinson in Bee's Adm. 419, de-

cided in 1781, that the "*practice of former times does not justify the admiralty taking cognizance of their suits.*"

See also *Pratt et al. v. Reed*, 19 How. 359.

So in Cunningham *et al. v.* Hall, 1 Clifford 43, recently decided in this court, the doctrine is maintained, that suits *in personam* by ship-builders are not within the jurisdiction of admiralty, unless they have a lien upon the ship, either local or maritime.

This case, and also *Cutler v. Rae*, and other cases before cited, would seem to make the jurisdiction to depend upon the existence of a *lien*, according to the rule laid down by Judge Peters in *Gardner et al. v. The Ship "New Jersey."*

1 *Peters, Adm.* 223.

If this is correct, then there can be no jurisdiction in admiralty over the subject of insurance.

The above authorities fully justify the assertion, that the broad doctrine of Delovio *v.* Boit is not sustained by the courts of this country.

3. Aside from the authorities, it is submitted, *from the reason of the thing*, that a policy of insurance is not a maritime contract. It is an agreement to indemnify the owner of the ship, cargo, or freight, against loss by perils of the seas. The suit is an action for damages for breach of the agreement. There is no lien, and the contract is in no sense maritime. It begins and ends on land. A maritime contract is where the thing to be done is itself maritime. "*It must be in its essence maritime.*" 2 *Wood. and Minot*, 109.

2 Parsons on Shipping and Admiralty, 181.

Suppose a policy upon a vessel upon the stocks, or after she is launched, and while waiting for her equipments or for a harbor risk, and the vessel is burnt by negligence or design, would admiralty take jurisdiction? Here is no voyage, no perils of the sea. The parties are the same, the subject-matter the same. What is the real distinction between such a policy and the present one? Is it said that the distinction is in the fact, that, in one case the vessel is water-borne or afloat, and in the other not?

Suppose a policy upon a cargo temporarily landed by reason of a disaster to the ship, and, while on shore, is destroyed by fire, or plundered. In such a case, the policy still attaches. *Bryant v. Com. Ins. Co.* 13 Pick. 543, 558. But would admiralty take jurisdiction?

4. It is not enough that as good a remedy may be afforded in admiralty as at common law. Such a rule would open the door of admiralty to suits of every kind, and end in confusion.

So long as a master cannot sue for his wages in admiralty, 11 *Peters*, 175; nor part owners, for matters of account between them, 11 *Peters*, 175; nor a mortgagee, to enforce payment of his mortgage, 17 *How.* 399; nor a shipbuilder, for building a ship, 20 *How.* 393, 1 *Clifford*, 43; nor material men who furnish supplies, for a vessel in a home port, 19 *How.* 359; nor any owner, for contribution by way of general average, 7 *How.* 729, — it is not easy to see how, or on what principle, a policy of insurance can be regarded as within the limits of admiralty jurisdiction. It is against law, precedent, and reason. And to sustain the jurisdiction, and retain these libels, necessarily would virtually overrule the case of Cunningham *v.* Hall, 1 Clifford, 43, the most recent case on this subject.

2 *Parsons on Shipping and Admiralty*, 181.

But it is said that a case of *general average* has been found in the admiralty records of Massachusetts, before the adoption of the Constitution, where jurisdiction was sustained; and it is claimed that the case supports the theory of jurisdiction, generally, in admiralty, over policies of insurance. If this is the proper inference from such a decision, it is equally true, that, in *Cutler v. Rae*, the Supreme Court of the United States held that there was no jurisdiction in such a case.

If these libels are dismissed, no harm comes to the plaintiff; for he is only sent to other tribunals of admitted jurisdiction, while the respondents are without remedy.

HENRY C. HUTCHINS, *for Respondents.*

Supreme Court of the United States.

THE NEW ENGLAND MUTUAL MARINE INS. CO.,

RESPONDENTS AND APPELLANTS,

vs.

THOMAS DUNHAM ET AL.,

LIBELLANTS.

ARGUMENT OF F. C. LORING

IN SUPPORT OF THE JURISDICTION OF THE U. S. DISTRICT COURTS OVER THE CONTRACT OF MARINE INSURANCE FOR THE LIBELLANTS.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1870.

Supreme Court of the United States.

THE NEW ENGLAND MUTUAL MARINE INS. CO.,

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DECEMBER TERM, 1870.

THE NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY, RESPONDENTS AND APPELLANTS,

vs.

THOMAS DUNHAM ET AL., LIBELLANTS.

STATEMENT OF CASE.

THIS suit, which is a libel on a policy of marine insurance, was originally brought in the United States District Court, for the District of Massachusetts, sitting in admiralty.

The libellants alleged that they were the owners of a certain vessel; that the respondents had made a policy of insurance, whereby they agreed to insure the libellants, in a certain sum, against damage to the said vessel by the perils of the seas; that during the term of the policy the vessel had suffered damage from a peril of the seas, for which the respondents were bound to indemnify them, and had refused so to do.

An answer was filed denying the merits of the claims. Some evidence was taken, and the cause was heard on that and an agreed statement of facts.

No exception was taken to the jurisdiction, and none was suggested at the hearing. A decree was rendered in favor of the libellants for the damage claimed, and an appeal was taken to the Circuit Court.

At the hearing in May, 1869, the respondents filed an exception to the jurisdiction, and arguments were submitted on that question and on the merits.

The amount sued for was less than $2,000, so that no appeal could have been taken to this Court; and it was expected that the decision of the Circuit Court would be final.

Before it was announced, that Court was re-organized by the appointment of an additional judge, under the new statute, and in May last, the cause was ordered to be again argued before the justice of the Supreme Court, sitting in the Circuit Court, and the new judge of that Court, on the question of jurisdiction. Arguments were accordingly submitted, the justices of the Court differed in opinion, and a certificate of division was made, by virtue of which the cause now comes before this Court.

The argument will, of course, be limited to the question of jurisdiction.

ARGUMENT FOR THE LIBELLANTS.

The contract of marine insurance concerns vessels, their ownership and navigation; cargoes, charter-parties, contracts of affreightment, profits and commissions on goods transported by water; carriage of passengers, damage by the perils of the seas, fire, and collision; hypothecations, salvage, wages, and provisions; averages, contributions, and jettisons; questions of prize, and all other maritime matters: and exclusively so, unless in some exceptional case, as the protection of cargo landed at a port of necessity, when the policy covers it, though on land.

All these are maritime matters, and it would seem to be a corollary, that a contract, relating to them exclusively, must be *maritime*, and be governed by the same laws, and be subject to the same jurisdiction.

On the continent of Europe, the jurisdiction of maritime courts, over contracts of marine insurance, has never been questioned, and is constantly exercised.[1] In Scotland, suits on policies are frequently, if not usually, brought before the Court of Admiralty, and in the appeals to the House of Lords, taken in many cases, no question has been raised as to the jurisdiction.[2] In England, the cognizance of policies of insurance was formerly claimed by the Court of Admiralty,[3] and it may be considered as an open question, so far as the written law shows,

[1] Val. Mar. Ord. Liv. 3, Tit. 6; Roccus on Insurance, note 80, and it is believed, exclusively.

[2] Paltison *vs.* Mills, 1 Dow & Cl. 322; Albion Ins. Co. *vs.* Mills, 3 Wilson & S. 218, are appeals to the House of Lords from decisions of the Scotch Court of Admiralty on policies.

[3] 2 Browne Civ. & Adm. Law, 82.

whether it (the jurisdiction) extends to contracts of marine insurance, remains yet to be definitely settled by the Supreme Court. But these contracts, relating as they do purely to maritime pursuits, and being eminently conducive, if indeed they are not to be regarded as indispensable, to the successful prosecution of navigation and commerce, it is not easy to perceive upon what ground they can consistently be excepted from the principles already established by that Court." [1]

In the reports of this Court, and of other courts of the United States, no other reference has been found to the contract of insurance as a matter of admiralty jurisdiction, except in *Taylor* v. *Carryl*,[2] where Mr. Chief Justice Taney expressed a doubt upon the subject, which had not been presented, or referred to in the argument, and which evidently he had not examined.[3]

Considering the authorities apart from the repeated declarations of this Court, that the admiralty jurisdiction of the District Court extends generally over maritime contracts, and the universal admission that marine insurance is a maritime contract, we have this express authority in favor of the jurisdiction:—

Three deliberate decisions of Mr. Justice Story, in point. The opinion of Mr. Justice Woodbury, that insurance is clearly a contract within the admiralty jurisdiction. The fact that Mr. Justice Curtis sustained the jurisdiction as a settled practice in the first circuit, and, as counsel, took no exception to it. The statement by Mr. Justice Story, of his belief that if the appeal before mentioned had been prosecuted, the jurisdiction would have been maintained by this Court. The decisions of Judge Sprague, Judge Ware, and Judge Lowell, of the District Court, and the opinions of Mr. Dunlap, Mr. Benedict, and Judge Conkling.

Against these, is only the doubt of Mr. Chief Justice Taney, above referred to, which does not amount even to a *dictum*.

The weight of authority is decidedly in favor of the jurisdiction; indeed, there is an utter absence of authority against it, even in England.

[1] See also note, 1 Kent's Com. 370, in which "Insurance" is mentoned as a matter of settled admiralty jurisdiction.

[2] 20 How. 585.

[3] There is a reference to policies in Bee's Adm. 200, where they, with bills of lading and bottomry bonds, are declared to be suable at common law only.

There is no case on record known, in which the Court of Admiralty has refused to entertain jurisdiction over the subject, or in which the courts of common law have prohibited it. In admiralty commissions, insurance is usually mentioned as a matter over which jurisdiction is to be exercised; and in Scotland, the Court of Admiralty, under similar commissions, constantly entertains such jurisdiction.

All that can be said about the exercise of the jurisdiction by the English court is, that, practically, it has not been resorted to.

Certainly this is no argument against the jurisdiction of the courts of another nation, having jurisdiction over all maritime contracts, which they have exercised for more than fifty years over contracts of insurance.

This Court has definitively established the rule that the admiralty jurisdiction is not limited to those cases over which the English Court of Admiralty practically exercised jurisdiction at the time of the revolution, and has declared by its Chief Justice that it extends to all maritime cases, *when not restrained by statute*. The only question then, is, whether or not marine insurance is a contract concerning matters of navigation, trade, commerce, etc.; or in other words, a maritime contract.

There can be only one answer; and the jurisdiction follows of course.

An argument in favor of a general jurisdiction of the United States courts in admiralty, over maritime cases, may be drawn from the power, vested in Congress to regulate commerce.

By virtue of this, Congress may legislate on all commercial matters; it may enact a code of commerce, regulating all affairs of navigation, affreightments, averages, marine insurances, and other maritime matters, and has exercised this power to some extent in those acts which limit the liability of ship-owners, provide for the registration of ships, regulate the carriage of passengers, establish rules for the carrying of lights, the navigation of vessels, etc., etc.

It would seem that the jurisdiction of the maritime courts of the United States should be co-extensive, and should embrace all commercial and maritime matters which Congress has the power to regulate. The remedies afforded by the United States courts of common law and equity are not adapted to all maritime cases, especially where a lien exists; and as their jurisdiction generally depends on the residence of the parties, it is doubtful whether they could exercise it in all cases; and there might be the anomaly of a government with power to make

laws and no tribunals to administer them; and this without remedy; for Congress has vested in the courts it created all the admiralty jurisdiction which the Constitution authorized it to confer.

The power is exhausted, and if the United States courts have not jurisdiction over all maritime cases, they cannot acquire it, except by an amendment of the Constitution.

If this were attempted, it would be difficult to find words sufficient to create a more ample jurisdiction than those used in the Constitution and consequent act of Congress.

If these courts have not jurisdiction over all maritime contracts and cases, it is not for want of certainty and distinctness in the law, but by reason of judicial construction and legislation, limiting the general terms used in the Constitution and statute.

It has been suggested by high authority[1] that the question of Admiralty jurisdiction is in a measure historical, and to be determined by the jurisdiction actually exercised by the Vice-Admiralty Colonial Courts before the revolution; inasmuch as such practical jurisdiction must have been known and contemplated by the framers of the constitution.

If a rule derived from such practice would tend to confine the jurisdiction within narrow limits, it would be open to the Constitutional objection so forcibly urged by Mr. Justice Wayne, in Waring *vs.* Clarke,[2] that it would add terms to the clause in the Constitution which creates a jurisdiction without limitation over all admiralty and maritime cases.

If, on the other hand, it should appear that these courts exercised a very large and comprehensive jurisdiction, very much larger than that exercised at the same time by the English Court of Admiralty, and in fact extending to all maritime contracts, then the argument that the framers of the Constitution meant what they said, when they declared that the jurisdiction should embrace *all* admiralty and maritime cases, becomes irresistible.

It is a matter of history that the commissions issued by the crown to the judges of the Colonial Courts of Admiralty, conferred, in terms, un-

[1] Cunningham *vs.* Hull, 1 Clifford, 52; Younger *vs.* Gloucester Ins. Co., 2 Curtis, 334.

[2] 5 Howard, p. 457.

limited jurisdiction over all maritime cases, and usually specified "*policies of assurance.*" [1]

It is alsoa matter of history that these courts, or some of them, exercised this jurisdiction over all maritime cases, without limit or qualification.

Until lately not much was known about the jurisdiction actually exercised by these courts. Allusions are made to it in the opinion of Mr. Justice Wayne, just referred to.[2]

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The Province of Massachusetts Bay, which comprised Massachusetts, Maine and Nova Scotia, was, before the Revolution, probably more largely engaged in commerce than any other, and the records of the Court of Admiralty held in it would be likely to contain more maritime decisions than would be found elsewhere.

Under the first charter of the Colony of Massachusetts Bay, admiralty jurisdiction was not reserved to the crown. It was exercised by the Court of Assistants. In Ancient Charters (App. p. 716), will be found a code regulating the rights and duties of mariners, owners, masters freighters, contributors, &c.; and the last article of the chapter provides that "*all cases of admiralty shall be heard and determined by the Court of Assistants . . . without jury, unless the Court shall see cause to the contrary. Provided, always, this act shall not be interpreted to obstruct the just plea of any mariner or merchant impleading any person in any other Court, upon any matter or cause that depends upon contract, covenant, or other matter of common equity, in maritime affairs.*" In other words, the Court of Assistants was vested with admiralty jurisdiction over all *maritime* cases of contract, covenant, or other matter of equity, reserving to the courts of common law concurrent jurisdiction, as is done by the judiciary act.

[1] See commissions quoted in De Lovio vs. Boit, and in Benedicts' Admiralty Practice, pages 82 and 90. He states that he has seen nine commissions.

[2] 5 Howard, pp. 454 and 457.

whether it (the jurisdiction) extends to contracts of marine insurance, remains yet to be definitely settled by the Supreme Court. But these contracts, relating as they do purely to maritime pursuits, and being eminently conducive, if indeed they are not to be regarded as indispensable, to the successful prosecution of navigation and commerce, it is not easy to perceive upon what ground they can consistently be excepted from the principles already established by that Court." [1]

In the reports of this Court, and of other courts of the United States, no other reference has been found to the contract of insurance as a matter of admiralty jurisdiction, except in *Taylor* v. *Carryl*,[2] where Mr. Chief Justice Taney expressed a doubt upon the subject, which had not been presented, or referred to in the argument, and which evidently he had not examined.[3]

Considering the authorities apart from the repeated declarations of this Court, that the admiralty jurisdiction of the District Court extends generally over maritime contracts, and the universal admission that marine insurance is a maritime contract, we have this express authority in favor of the jurisdiction:—

Three deliberate decisions of Mr. Justice Story, in point. The opinion of Mr. Justice Woodbury, that insurance is clearly a contract within the admiralty jurisdiction. The fact that Mr. Justice Curtis sustained the jurisdiction as a settled practice in the first circuit, and, as counsel, took no exception to it. The statement by Mr. Justice Story, of his belief that if the appeal before mentioned had been prosecuted, the jurisdiction would have been maintained by this Court. The decisions of Judge Sprague, Judge Ware, and Judge Lowell, of the District Court, and the opinions of Mr. Dunlap, Mr. Benedict, and Judge Conkling.

Against these, is only the doubt of Mr. Chief Justice Taney, above referred to, which does not amount even to a *dictum*.

The weight of authority is decidedly in favor of the jurisdiction; indeed, there is an utter absence of authority against it, even in England.

[1] See also note, 1 Kent's Com. 370, in which "Insurance" is mentoned as a matter of settled admiralty jurisdiction.

[2] 20 How. 585.

[3] There is a reference to policies in Bee's Adm. 200, where they, with bills of lading and bottomry bonds, are declared to be suable at common law only.

There is no case on record known, in which the Court of Admiralty has refused to entertain jurisdiction over the subject, or in which the courts of common law have prohibited it. In admiralty commissions, insurance is usually mentioned as a matter over which jurisdiction is to be exercised; and in Scotland, the Court of Admiralty, under similar commissions, constantly entertains such jurisdiction.

All that can be said about the exercise of the jurisdiction by the English court is, that, practically, it has not been resorted to.

Certainly this is no argument against the jurisdiction of the courts of another nation, having jurisdiction over all maritime contracts, which they have exercised for more than fifty years over contracts of insurance.

This Court has definitively established the rule that the admiralty jurisdiction is not limited to those cases over which the English Court of Admiralty practically exercised jurisdiction at the time of the revolution, and has declared by its Chief Justice that it extends to all maritime cases, *when not restrained by statute.* The only question then, is, whether or not marine insurance is a contract concerning matters of navigation, trade, commerce, etc.; or in other words, a maritime contract.

There can be only one answer; and the jurisdiction follows of course.

An argument in favor of a general jurisdiction of the United States courts in admiralty, over maritime cases, may be drawn from the power, vested in Congress to regulate commerce.

By virtue of this, Congress may legislate on all commercial matters; it may enact a code of commerce, regulating all affairs of navigation, affreightments, averages, marine insurances, and other maritime matters, and has exercised this power to some extent in those acts which limit the liability of ship-owners, provide for the registration of ships, regulate the carriage of passengers, establish rules for the carrying of lights, the navigation of vessels, etc., etc.

It would seem that the jurisdiction of the maritime courts of the United States should be co-extensive, and should embrace all commercial and maritime matters which Congress has the power to regulate. The remedies afforded by the United States courts of common law and equity are not adapted to all maritime cases, especially where a lien exists; and as their jurisdiction generally depends on the residence of the parties, it is doubtful whether they could exercise it in all cases; and there might be the anomaly of a government with power to make

laws and no tribunals to administer them; and this without remedy; for Congress has vested in the courts it created all the admiralty jurisdiction which the Constitution authorized it to confer.

The power is exhausted, and if the United States courts have not jurisdiction over all maritime cases, they cannot acquire it, except by an amendment of the Constitution.

If this were attempted, it would be difficult to find words sufficient to create a more ample jurisdiction than those used in the Constitution and consequent act of Congress.

If these courts have not jurisdiction over all maritime contracts and cases, it is not for want of certainty and distinctness in the law, but by reason of judicial construction and legislation, limiting the general terms used in the Constitution and statute.

It has been suggested by high authority[1] that the question of Admiralty jurisdiction is in a measure historical, and to be determined by the jurisdiction actually exercised by the Vice-Admiralty Colonial Courts before the revolution; inasmuch as such practical jurisdiction must have been known and contemplated by the framers of the constitution.

If a rule derived from such practice would tend to confine the jurisdiction within narrow limits, it would be open to the Constitutional objection so forcibly urged by Mr. Justice Wayne, in Waring *vs.* Clarke,[2] that it would add terms to the clause in the Constitution which creates a jurisdiction without limitation over all admiralty and maritime cases.

If, on the other hand, it should appear that these courts exercised a very large and comprehensive jurisdiction, very much larger than that exercised at the same time by the English Court of Admiralty, and in fact extending to all maritime contracts, then the argument that the framers of the Constitution meant what they said, when they declared that the jurisdiction should embrace *all* admiralty and maritime cases, becomes irresistible.

It is a matter of history that the commissions issued by the crown to the judges of the Colonial Courts of Admiralty, conferred, in terms, un-

[1] Cunningham vs. Hull, 1 Clifford, 52; Younger vs. Gloucester Ins. Co., 2 Curtis, 334.

[2] 5 Howard, p. 457.

limited jurisdiction over all maritime cases, and usually specified "*policies of assurance.*" [1]

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[1] See commissions quoted in De Lovio vs. Boit, and in Benedicts' Admiralty Practice, pages 82 and 90. He states that he has seen nine commissions.

[2] 5 Howard, pp. 454 and 457.

This act was passed in the year 1673, and shows what was considered to be the proper jurisdiction of the admiralty at that time. No allusion is made to the English practice, though that must have been well known; but the Court of Assistants was vested with the fullest jurisdiction over all maritime contracts, and other matters of (maritime) equity.

This act seems to be a code or compilation of rules for the regulation of commerce, navigation, freight and wages, etc., similar to those to be found in the marine ordinances and other sea-codes, besides appointing a tribunal for their administration. It is quite long, containing thirty sections, of the last of which a part has been quoted. It was probably annulled when the first charter was vacated in 1684.

When the charter of *the Province of Massachusetts Bay* was granted, in 1691, all "*admiral court, jurisdiction, power, or authority*" was reserved to the crown, to be exercised by virtue of commissions to be issued under the great seal.[1]

Some of the commissions issued to the judges of the Admiralty Court provinces may be found in the books, and they confer jurisdiction over all maritime causes and cases in the most unqualified terms.[2]

But until lately, little was known as to what jurisdiction was actually exercised by the judges under these commissions. In the office of the District Court for Massachusetts there was only one imperfect volume of the records of the Vice-Admiralty Court of the province. This is not half filled, and contains only a few cases which relate to matters of prize, revenue and wages.

The other volumes were supposed to have been taken to Halifax, at the time of the evacuation of Boston, and to have been lost or destroyed. Lately, two volumes have been found among the papers of a former registrar of the court, and have been deposited in the library of the Boston Athenæum: they are the second and third volumes, beginning in 1718, and extending to 1733. The first is missing. The one in the

[1] Ancient Charters, page 36.

[2] A commission is quoted at length in Benedict's Adm. p. 83, which is stated to be a translation of one issued to Roger Mompesson in 1703, as judge of Vice-Admiralty in the provinces of Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, the Jerseys, New York and Pennsylvania. In this commission among other contracts specified, are "*policies of assurance.*"

clerk's office extends from 1740 to 1744 only; and the rest are also missing.[1]

An examination of these two volumes discloses that the Court exercised jurisdiction over all maritime cases. Besides numerous suits for wages, and liberations, and assaults, they contain records of over fifty cases of libels on maritime contracts. There may be found libels for contribution, both *in rem* and *in personam;* on charter-parties, on contracts of affreightment for freight, for non-delivery or damage to goods; between owners for an account; by masters *in rem* for wages and disbursements; against a mate for non-performance of his contract; for surveys, condemnations, and sales; of material-men, for supplies in home port *in rem;* against mate, for error in making a bill of lading; by builder of a ship, for its price *in rem*, after it had been delivered; by passengers, and various other cases. In one case, a consignee sued a master for non-delivery: he answered that the goods were thrown overboard for the common safety; the Court found that the jettison was justifiable, and sent the case to commissioners to adjust the average. This decision anticipated that of *Dupont* v. *Vance*[2] more than a century.

Another case resembles *Taylor* v. *Carryl.*[3] It was a suit *in rem*, by an assignee of a master and mate, for wages, etc. The libel alleged that the vessel had been attached by a creditor at common law. The Court ordered the marshal to take possession and sell; and, after satisfying the claim of the libellant, to pay the residue into the registry, to answer the claim of the attaching creditors. In *Taylor* v. *Carryl*, a divided Court held that an attachment at common law could not be so subjected to a maritime lien.

If a similar jurisdiction was exercised in the Admiralty Courts of the other colonies, there would be no doubt as to what the framers of the Constitution had in mind.[4]

There is one case reported in Pennsylvania, — *Talbot's case,*[5] — which shows that the Court of Admiralty of that province exercised jurisdiction over all maritime cases.

An act of assembly gave the judge of admiralty cognizance of all suits of maritime jurisdiction not cognizable at common law. Literally

[1] It is not known that any of the records of the other Vice Admiralty Courts are in existence. They were probably carried off or destroyed at the time of the revolution.

[2] 19 How. 162.

[3] 20 How. 583.

[4] Opinion of Mr. Justice Wagner, 5 Howard, 454.

[5] 2 Dall. 94.

construed, this would have limited the jurisdiction to matters of prize. But the Supreme Court held that it could not have been so intended, and that the true construction was, that the jurisdiction embraced all suits of a maritime nature not properly cognizable at common law, and, consequently, all those relating to maritime matters over which the common law had usurped or otherwise obtained jurisdiction: thus extending the jurisdiction to the largest limit ever claimed for it.

That the framers of the Constitution, and the lawyers of that day, were familiar with a different and more extensive jurisdiction in the colonies than was practised in the English Court of Admiralty, is asserted by Judge Wayne in his opinion in Waring *vs.* Clarke, 23 Howard, 454 and 457; and the authorities cited by him fully maintain the assertion.

It will be found, on examining the records referred to, that no objection was made to the extensive jurisdiction exercised. It seems to have been considered a matter about which there could be no doubt. In one case only was there a plea to the jurisdiction. A master sued *in rem*, in the home port, for wages and disbursements. Such a plea was interposed and overruled.

The jurisdiction claimed by Judge Story, Judge Ware, and others, for the Admiralty Courts of the United States, is not something new and before unknown; but is not so extensive as was actually exercised by the colonial courts.

If the jurisdiction, known to have been exercised by the admiralty courts before the revolution, is to be taken as the rule, it must be admitted that every case which can properly be defined as maritime, is a proper subject for the jurisdiction of the United States District Court; and, of course, marine insurance.

The same conclusion must be drawn from the fact that admiralty jurisdiction was exercised by the Vice Admiralty Court of Massachusetts, over all maritime contracts and cases. The judge who presided in that court was at the same time the judge of the Vice Admiralty Courts of New York, Pennsylvania, the Jerseys, New Hampshire, Connecticut, Maine and Nova Scotia,[1] and it must have been that he held and exercised the same jurisdiction, when holding court in the other colonies or

[1] Ben. Adm. Pr. 88, note, contains memorandum of a commission to Roger Mompesson, dated April, 1703, appointing him judge of admiralty in these colonies. Maine and Nova Scotia then, were parts of the Province of Massachusetts Bay.

provinces included in his commission, that he did when sitting in Massachusetts.

The argument, to be derived from *history*, is conclusive in favor of a literal construction of the words of the Constitution and statute giving the courts of the United States jurisdiction over all admiralty and maritime cases.

For it appears that the commissions, issued to the judges of the Vice Admiralty Courts, before the revolution, conferred jurisdiction over all maritime cases without restrictions, sometimes specifying "*policies of assurances*," and that this jurisdiction was exercised to its fullest extent, without any regard to the practice of the English Court of Admiralty, in most, if not in all, of the colonies or provinces which afterwards became the United States.

It is impossible to suppose that this practice was not known to the statesmen and lawyers who framed the Constitution, or that they contemplated any limit to the jurisdiction which the Court of Admiralty they created might exercise over maritime contracts and cases.

It appears from the "Federalist," that, in the convention, no disposition was shown to deny the National Judiciary the cognizance of maritime cases; and it does not appear that any objection was made to this grant in the State conventions which adopted the Constitution.[1]

Another argument in favor of the exercise of a large jurisdiction over maritime contracts, and contracts of marine insurance especially, is that it tends to promote uniformity of principle and practice throughout the different States in the administration of law.

The practical reasons in support of such a jurisdiction generally, are fully stated by Mr. Chief Justice Taney, in Taylor *vs.* Carryl,[2] and need not be repeated.

Of all maritime contracts, that of insurance is probably the one most extensively in use. It is known and practised in all civilized countries. It is important that the rules, practice, and laws which relate to it should be the same throughout the world, so far as is possible. That they vary in different places is a source of much confusion and embarrassment, and has been greatly lamented by jurists.

This Court cannot of course influence courts of other countries

[1] See Elliot's Debates.

[2] 20 Howard, 580.

directly, but it can do much towards establishing uniformity of law and practice in the construction and administration of the law of insurance in this country by exercising jurisdiction over the subject. It can, by so doing, establish rules and principles for the regulation of this contract, which will bind all the other courts of the United States.

Now, the contract and the rights and liabilities of the parties to it, are construed differently in almost every State.

Probably in no two States are the laws and practices, concerning insurance, the same. In Massachusetts, an insurer may take a vessel into his possession and repair it, without being held to have accepted an abandonment. This Court, and some State courts, hold that he cannot.

This Court holds that if a ship be voluntarily stranded and lost, and the cargo saved thereby, it and its insurers are subject to a contribution for the loss. In Massachusetts, until lately, and in other States, a different rule prevails.

This Court holds that an insurer is not liable for the damage which the offending vessel in a collision is obliged to pay. The contrary is the rule in the courts of Massachusetts.

Numberless illustrations might be adduced to show the want of uniformity and chaotic state of the law and practice of insurance; but it is, unhappily, too notorious.

If a suit on a contract of insurance can be maintained in the admiralty, it must be decided according to the rules and principles of this Court, and that would establish absolute uniformity in one court in every State in the Union, and have a strong tendency to establish it in the State courts, because of the great dignity of the Court, the respect paid to its decisions, and its controlling influence over all matters over which it exercises jurisdiction.

If the admiralty cannot exercise this jurisdiction, it must be left principally to the State courts, and the differences of opinion and practice, so much deplored, will remain and increase. The jurisdiction of the Federal courts, at law and in equity, being generally dependent on the citizenship of the parties, cannot often be invoked; and the decisions of these courts, however highly respected, are not conclusive and binding on the State courts in matters depending on private contracts.

If, on the other hand, the jurisdiction of the admiralty over insurance

should be established, the great advantage of its process, the celerity of its proceedings, and its other advantages, will cause it to be largely resorted to, and the thirty-seven District courts, and all the Circuit courts, being subject to one rule, uniformity of principle and decision will be established through all the States, the advantages of which in a nation of such commerce as this, and where contracts of insurance are made, a thousand or more every day, cannot be overstated.

So far, the question of jurisdiction over policies of insurance has been treated principally as if it were a new question open to discussions, but it is respectfully submitted that it cannot so be considered.

For more than fifty years the jurisdiction has been exercised or asserted by the learned jurists, all justices of this Court, who have presided in the Circuit Court for the first circuit, and by the judges of the District Courts of Massachusetts and Maine.

Justices Story, Curtis, Woodbury, Ware, Sprague, and Lowell, have either sustained the jurisdiction whenever the question has come up, or expressed such opinions of the decision given in *De Lovio* v. *Boit*, or otherwise, as could leave no doubt as to their own judgment on the subject.

Mr. Justice Woodbury said the Court would sustain a libel on a policy as clearly within the jurisdiction.

Judge Sprague said, "*the jurisdiction over policies is the settled law and practice of this Court.*"

The records of the Circuit Court show four express decisions on policies of insurance.[1] To which may be added, *Dean* v. *Bates*, 2 Woodbury & M. 88, in which Mr. Justice Woodbury expressed the decided opinion, above referred to, making in all five decisions, in which the jurisdiction of the United States District Court over policies of insurance has been affirmed or exercised by justices of this Court.

The libellant had therefore a right to consider the question as no longer open, and that his claim would be considered and decided on the merits, without his being subjected to the additional delay and expense of a protracted litigation about the jurisdiction.

The binding force of precedents is universally recognized in courts of law, and a stronger case in this respect can hardly be imagined than

[1] *De Lovio* vs. *Boit*, 2 Gall.; *Peele* vs. *Merchants' Ins. Co.*, 3 Mason, 20; *Hale* vs. *Washington Ins. Co.*, 2 Story, 176; *Yonger* vs. *Gloucester Ins. Co.*, 2 Curtis, 322.

this, where the course of decision is uniform from 1815, when the question was first presented, down to 1867. *Stare decisis* is a well-established rule, founded on principles of reason and justice as well as of expediency.

The libellants do therefore submit, with the greatest deference and respect, that to exercise jurisdiction over policies of marine insurance is the established law and practice of the Circuit Court for the first circuit held by justices of this Court; that such practice is in conformity with the universal maritime law and usage; with the decisions of this Court affirming jurisdiction over charter parties, and maritime contracts generally; with the jurisdiction exercised by the Vice-Admiralty Courts before the revolution, which must have been known to the makers of the Constitution; and is imperatively required to carry into effect the provisions of the Constitution touching the jurisdiction of its courts and the regulation of commerce, and to establish uniformity of principle and practice throughout the Union in one of the most important branches of commercial law.

It cannot now be questioned that the framers of the Constitution intended to vest in Congress the power to establish courts to exercise admiralty jurisdiction over all admiralty and maritime cases.

Congress, in the exercise of its discretion, might have conferred upon the courts it was to create such jurisdiction as it should see fit, and limit it to certain cases, but nothing of the kind was done. The Judiciary Act confers on the District Courts unqualified jurisdiction over all civil admiralty and maritime cases.

If, then, the contract of marine insurance is "*maritime*," it is a subject over which the District Courts of the United States must exercise jurisdiction.

The argument for the respondents has not been filed, but assurance has been given that it will not vary substantially from that presented in the Circuit Court, to some of the suggestions in which a brief answer will be attempted.

It is again insisted that the practical jurisdiction of the English Court of Admiralty at the time of the Revolution, must afford the rule for the jurisdiction of the District Courts of the United States.

It has been shown that no such rule has ever been recognized by this Court. In Hall *vs.* Cunningham, 1 Clifford, p. 51, it is said: "*It is well*

settled that the jurisdiction of the District Court is not limited to the particular subjects on which the English Courts of Admiralty exercised jurisdiction when the Federal Constitution was adopted." If the question should be raised again, the Court will probably say, as in a similar case,[1] that it is hoped that the question is now "*mooted for the last time.*"

Another proposition found in the same opinion is: "*That the jurisdiction in admiralty, under the Constitution and laws of Congress, does not extend to all cases which would fall within it according to the civil law and the practice and usages of Continental Europe.*"

It cannot be denied that this restriction has in some cases, and to some extent, been recognized. This Court has declined to enforce maritime laws and privileges *in rem*, when not accompanied by possession, which other Admiralty Courts would have respected;[2] and has declined to exercise jurisdiction over some causes clearly maritime. Whether at some future time these earlier decisions may not be reconsidered, and a rule established more consistent with the literal terms of the Constitution and Judiciary Act, and the practice before the Revolution, is a question not necessary or pertinent to be discussed here. The current of opinion seems to be in that direction.[3]

A decision in favor of the jurisdiction in this case does not require a reversal or even a revision of any decision of this Court.

It is said that the Court of Admiralty has never claimed jurisdiction over insurance in England. This statement, if correct, is not pertinent. Mr. Browne states that "*The cognizance of policies of insurance was of old, claimed by the Court of Admiralty.*"[4] This is confirmed by the fact that the earliest case at common law on a policy of insurance, occurred so late as the 30th and 31st of Elizabeth's reign, though insurances, it is said, had existed "time out of mind." At that time, the Court of Admiralty had been stripped of almost all its rightful jurisdiction. A

[1] Morewood *vs.* Enequoist, 23 How. 493.

[2] Bags of Linseed, 1 Black, 108

[3] See opinion of Taney, C. J., in Taylor *vs.* Carryl, 20 Howard, 611 and 617; Morewood *vs.* Enequoist, 23 Howard, 492; The Commerce, 1 Black, 374: The Eagle, 8 Wallace, 15; The Emma Johnson, 1 Clifford, 643. Recent legislation in England has restored to a great extent the ancient jurisdiction of the admiralty, 3 & 4 Vict. c. 65; 17 & 18 Vict. c. 104; 23 & 24 Vict. c. 127; 24 & 25 Vict. c. 10; 25 & 26 Vict. c. 63.

[4] 2 Browne, Cov. and Adm. Law, 82.

suitor on a policy therefore could have no relief except at common law. To remedy this, a statute was passed establishing a special court for the hearing of insurance causes, which sat without a jury, and of which the *Judge of Admiralty* was the head.[1]

It is also said that the decisions of the American courts at the period of the revolution and afterwards, and of the colonial courts previously, prove the restricted jurisdiction of the admiralty.

There are to be found in Bee's reports some decisions of an early date, to the effect that the Admiralty Courts have no jurisdiction over matters suable at common law, and a few more may be found elsewhere; but they are entitled to no consideration now, and it would be a waste of time to examine them in detail. It is enough to say that they are entirely opposed to the decisions of this Court.

The jurisdiction exercised by the colonial Courts of admiralty before the Revolution, was, as has been shown, most liberal and comprehensive, and gives no support to the construction for which the respondents contend.

If the existence and contents of the records lately found had been earlier known, the Courts would have been saved the necessity of considering arguments against the Admiralty Jurisdiction, based on the practical jurisdiction exercised in England and in the colonies, and much litigation have been prevented.

It is agreeable to find that the liberal construction uniformly maintained by majorities in this Court is in accordance with the practice which prevailed in the colonial Courts.

It can no longer be said with truth, if it ever could have been, in reference to the practical system existing before the Revolution, that there is "*not an ingredient, not a fragment of any such system to be discovered.*"[2]

Again, it is urged that the extension of admiralty jurisdiction was one of the grievances which led to the Revolution, and therefore it is not reasonable to suppose that the framers of the Constitution would have perpetuated the very evil of which they complained.

But it is matter of history that the extension complained of related exclusively to revenue and criminal cases, that the evil was the taking

[1] Introduction to Park. on Ins. page 38.

[2] Opinion of Justice Daniel, 20 Howard, 311.

away of trial by jury in cases where it previously existed. The civil jurisdiction was exercised under the King's commission, always, without a jury. It never was matter of legislation or of complaint, nor extended by statute.

It is said that a cargo insured might be destroyed while ashore; and it is asked if the Admiralty Court would then exercise jurisdiction.

The answer is, undoubtedly, if insurance is a maritime contract. The accident of the loss happening on land, does not alter the nature of the contract, if the cargo is covered by the policy.

Goods are sometimes covered by a bill of lading while on shore; but if they are burned, it has never been suggested that the admiralty has lost jurisdiction because the loss happened on land.[1]

It is said that the records of the Colonial Court referred to do not contain a case of a libel on a policy of insurance. This is no proof that the court would not have sustained the jurisdiction. If a suit had been brought and dismissed for want of jurisdiction, that would be to the purpose; but it proves nothing that no such suit was brought. Insurance was very little practised then, compared to what it is now, and the records known cover but a few years, — from 1718 to 1733, and 1740 to 1744. If we find that the Court exercised jurisdiction over every other maritime cause which was brought before it, and to a much larger extent than has ever been done in the United States Courts, it may not be supposed that it would not have exercised it over a contract of insurance, especially when that is specified in the commission of the judge as one of the matters on which he was to take cognizance.

Again, it is suggested that a policy of insurance is not a maritime contract because it is made on land.

The same objection has been repeatedly taken in suits for wages, charter parties, bills of lading, bottomry bonds and other maritime contracts; but the Court nevertheless exercises jurisdiction over them, and has gone so far as to establish the jurisdiction over contracts not only made on land, but to be performed on land. The rule No. 12, passed Dec. Term, 1858, directs that "*In all suits by material men for supplies, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceeding in personam, but not in*

[1] The Tangier, 1 Clifford, 383; Richardson vs. Goddard, 23 How. 28.

rem, shall apply to cases of domestic ships for supplies, repairs, or other necessaries." This restores, in a measure, the practice which prevailed in the Vice-Admiralty Courts.

Contracts for supplies, repairs, &c., are made on land and performed on land, and are, nevertheless, subject to the jurisdiction of the District Court sitting in Admiralty.

It is, then, no objection to the exercise of the jurisdiction over a contract of insurance that it is made on land, and in case of loss is payable on land. The same objection exists against all other maritime contracts. In fact, contracts are seldom made on the seas or are wholly performed there.

The question is not where the contract was made, but what does it concern, and marine insurance concerns only what happens on the seas to ships, cargoes and freights, collisions, averages, hypothecations, wages and provisions, contribution, jettisons, and matters of prize and other maritime matters, and is therefore strictly a maritime contract.

It is said that the admiralty can not exercise jurisdiction over contracts of insurance because there is no lien.

But it is well settled here and in England, that the Admiralty Courts originally acted principally *in personam*, without regard to there being a remedy *in rem*; and where that existed it was subordinate and auxiliary to its action *in personam*.[1]

It is also stated "*that the only instance where insurance is mentioned as within the jurisdiction, is in certain commissions, issued during the period of Richard II.*" and that Mr. Justice Story "*relies chiefly on the general language of the Vice-Admiralty Commissions in which policies of insurance are not named.*"

This is a singular mistake.

In Benedict's practice, page 83, a commission is given at length, granted by George III. in 1762, in which "*policies of assurance*" are specifically mentioned as matters of which the judge of the Admiralty Court is to take cognizance. Mr. Benedict states, page 87, that he has seen a previous commission which was *in the same words*, and that they were translations of the commissions of judges who had previously filled the office, embracing the colonies from Delaware to Massachusetts, inclusive. He says he has seen eight.

[1] The Boston, 1 Sumner, 328. The Hope, 3 Rob. 215. The Trelaway, 3 Rob. 216. Shepard *vs.* Taylor, 5 Peters, 675.

It is said that the doctrine of De Lovio *vs.* Boit is unsound, has not been approved of by the profession generally, and that it has been overruled by this Court.[1]

As to the doctrine of De Lovio *v.* Boit, it may be admitted that it has been sometimes questioned and sometimes denied by individual justices of this Court, but never by the Court or a majority of it. It has not been approved of by Justices Daniels, Baldwin, Campbell or Woodbury; but it may be said to have had the unqualified support of Chief Justice Marshall, and Justices Washington, Wayne, McLean, not to mention others now living; and the principles on which it is founded have been repeatedly affirmed in the decisions of this Court sustaining jurisdiction over charter parties, averages, and other maritime cases. Even Mr. Justice Campbell has admitted that the profession and this Court do now maintain the "*broad pretension for the admiralty*" set up in De Lovio *vs.* Boit.[2]

It is insisted that De Lovio *vs.* Boit is "*virtually overruled*" by the decision in Cutler *vs.* Rae.[3] It might seem to follow that if the District Court had no jurisdiction to enforce a general average contribution, *in personam*, it could not take cognizance of a policy of insurance.

But if the contract, or *quasi* contract, of general average cannot be enforced *in personam*, it does not necessarily follow that an express contract of insurance cannot. But if it should so be held, then the question arises as to what the Court decided in Cutler *vs.* Rae, and whether that decision is now of authority.

On examining the opinion, it is plain that the general jurisdiction over averages was not even considered. The points raised and discussed, and authorities referred to in the argument submitted in favor of the jurisdiction,[4] are not alluded to.

The only point decided is, that the maritime law does not *imply* a promise from the owner of goods liable to a contribution to pay his proportion; a necessary inference being, that if the owner had expressly promised to pay, an action would be sustained, as it was not denied that a suit *in rem* would be within the jurisdiction.

[1] Cutler *vs.* Rae, 7 Howard, 729.
[2] Jackson *vs.* the Magnolia, 20 Howard, p. 335, 8, 1857.
[3] 7 Howard, 729.
[4] 7 How. 729; 8 How. App. 613.

The general jurisdiction over averages was not considered, and this decision can have no bearing where the suit is on an express contract as on a policy of insurance; and so *Cutler* v. *Rae* affords no ground of objection. But supposing it did, the question remains, — to what respect is that decision entitled?

The point decided, as already stated, is, that where goods liable to contribution are delivered to the owner, he cannot be sued in the admiralty, not because the claim is not of a maritime nature, but because the promise to pay is *implied*; or, in other words, that if goods subject to a maritime lien are delivered, not only the lien is lost, but there is no remedy in the admiralty, *in personam*, to recover the debt.

To state this proposition is enough to refute it. It contradicts the rule that the jurisdiction depends upon the subject-matter, not upon whether the action is *in rem*, or *in personam*. It asserts that the Court cannot entertain a suit founded upon a subject peculiarly within its jurisdiction, unless the obligation of the defendant rests upon an express promise. According to it, if a ship-owner delivers goods to a consignee, or a salvor to an owner, without taking an express promise to pay freight or salvage, there is no relief to be had in a Court of Admiralty; for the maritime law, which gives the lien, does not imply a promise to pay if the lien is waived. An action might be maintained on a charter-party, because it contains a promise to pay, but not against a consignee for goods accepted, because his agreement to pay freight is implied. Whereas it is well known that the waiver of a lien does not oust admiralty jurisdiction.[1]

From the dissenting opinion of Mr. Justice Wayne, and his statement in the Appendix to 8 Howard, it appears that the case was not thoroughly considered; that the printed argument in favor of the jurisdiction was not before all of the Court, and was not alluded to in conference; that the decision was made by a divided court, Mr. Justice Catron not giving an opinion because he was "*not satisfied either way*" "*that the remaining eight judges were at first equally divided, and that it was finally disposed of rather from acquiescence in what was thought to be English authority against the jurisdiction, than from a close and searching scrutiny into the practice and jurisdiction of Courts of Admiralty.*"

If the argument in favor of the jurisdiction had been read, the Court

[1] 2 Parsons on Shipping, 247.

would have learned that the English admiralty, on whose supposed practice the decision was based, had, in several cases, entertained jurisdiction over averages.[1]

As might be expected, this decision has not been very respectfully considered by the profession. Mr. Justice Wayne said, if the case were presented in his circuit, he should consider the question open and hear an argument.[2]

In *Dike* v. *The St. Joseph*,[3] Mr. Justice McLean says, "*The decision in the case of Cutler vs. Rae was by a divided Court, and it has not been satisfactory to the profession; nor was it a decision in accordance with the prior decisions of the Supreme Court.*"

It has been supposed that this decision excluded all claims for average, whether *in rem* or *in personam*, from the jurisdiction;[4] but in *Dupont de Nemours* v. *Vance*,[5] it was decided that a suit *in rem* might be entertained. This virtually overrules *Cutler* v. *Rae*, because of the axiom that the jurisdiction does not depend upon the form of action, but upon the subject-matter.[6]

In a suit to recover a general average, whether *in rem* or *in personam*, the subject-matter is the liability of the *res*, or its owner, to pay a marine contribution. If either is a matter of admiralty jurisdiction, both must be.

The final blow to the authority of *Cutler* v. *Rae* was given by Mr. Chief Justice Taney, who delivered the opinion in that case, in a dissenting opinion given in *Taylor* v. *Carryl*.[7] In this he admits that the extent of the admiralty jurisdiction is correctly stated in the note to 1 Kent's Com. 370, except in one respect; and among the subjects there mentioned, are "*averages, contributions, and jettisons*," without reference to the form of action.

The elementary writers treat this decision with as little respect as the justices of the Supreme Court. See 1 Parsons on Maritime Law, 1st ed. page 334, and vol. 2d, note to page 511; Benedict, Adm. Pr. 111, 167, and note; note to 1 Kent, 370. And, as has been shown, suits to recover averages, both *in rem* and *in personam*, were constantly entertained by the Vice-Admiralty Courts before the revolution.

[1] 8 How. 624.
[2] 6 McLean, 663; see also notes to Sprague's decisions, p. 138, 143.
[3] 7 How. 734.
[4] *The Mazurka*, 2 Curtis, 71.
[5] 19 How. 162.
[6] 6 How. 392.
[7] 20 How. 583.

The case of *Cutler* v. *Rae* must be considered as overruled and of no authority, and would afford no reason for denying the jurisdiction of the admiralty over contracts of marine insurance, if they were identical with averages.

It may be asserted, without fear of contradiction, that there is no authority, entitled to consideration, against the exercise by the District Courts sitting in admiralty of jurisdiction over contracts of marine insurance to be found in the books; and certainly none in the records of the Courts so far as they have been resorted to. In every reported case the jurisdiction has been maintained

The Constitution and judiciary act declare and enact that the jurisdiction of the Courts of the United States shall embrace all admiralty and maritime cases; it has been declared by the highest authority that the Courts of the United States have never doubted their right to proceed under their general power as Courts of Admiralty, where they are not restrained from the use of these powers by statute; this Court, by repeated decisions, has affirmed the general jurisdiction over maritime contracts; the commissions to the judges of the colonial Vice-admiralty Courts authorized them to take cognizance of all maritime cases, and usually specified policies of insurance as such; and this jurisdiction was exercised without limit or stint throughout most, if not all, of the provinces and colonies which afterwards constituted the United States, without any regard to the limited jurisdiction exercised by the English Court of Admiralty at the same time, a fact which must have been known to the framers of the Constitution and the members of the Congress which passed the judiciary act and enacted that the U. S. District Court should have jurisdiction of all maritime and admiralty cases.

If, then, the contract of marine insurance is properly a *maritime contract*, it is within the jurisdiction of the District Court; and as to that "all *jurists and civilians agree that in this appellation are included, among other things. . . . contracts and quasi contracts respecting averages, contributions, and jettisons, and policies of insurance.*" [1]

As has been shown, the Courts of Admiralty in every civilized commercial nation, with one exception, exercise jurisdiction over policies of

[1] Mar. Ord. Liv. 3, Tit. 6. Roccus on Assurances, note 80, and authorities cited in note to De Lovio vs. Bord, 2 Gal. p. 473.

marine insurance: this practice has been found beneficial, and will be more so in this country on account of its great extent, and the increase of the practice of insurance.

It is to be hoped that this Court will not establish another exception, and deprive the citizens of the United States of the privilege and right to which they are entitled under a literal and reasonable construction of the terms of the Constitution, to resort to its Courts in such cases.

Subjoined is a note of some of the decisions in the records before mentioned. No reference is made to those concerning wages, assaults, discharge of seamen, great fishes and other matters over which the admiralty jurisdiction has not been disputed.

F. C. LORING,
Proctor for the Libellants.

Book second, 1718 to 1726; page 3 is a libel on a bill of lading for non-delivery; 21, on a charter party; 24, petition and order for a survey; 33, for freight; 39, against a master delaying to sail, praying for discharge of cargo and for damage; 43, three against proceeds for provisions, bread and beer supplied in home port; 48, assignee of master and mate *in rem* for wages, etc., alleging attachment of vessel at common law: the Court ordered the vessel to be arrested and sold, libellant's claims paid, and balance paid in the registry to await claim of the attaching creditor. 51, by a passenger for his chest; 55, master *in rem* for wages; 58, for general average; 59, 61, for freight *in personam;* 63, *in rem* for supplies in home port; 63, master *in rem* in home port for wages and disbursements; 66, shipper for damages by bad stowage; 70, *in rem* in home port for money loaned to fit vessel for sea; 75, against consignors for a general average contribution; 102, between co-owners, sale ordered; 114, master *in rem* for wages, etc., the same, exception taken to jurisdiction overruled; 117, sale ordered on petition of owners of one-half a vessel; 119, master *in rem* for wages; 123, for wharfage *in rem;* 133, for rigging in home port *in rem;* 163, for pilotage; 163, by owner of a half against the other owner who was also an owner for an account; 164, by a passenger against master and crew for embezzlement of liquors; decree that master should pay the damage and have relief from those of the crew who were not innocent

by way of average; 175, against master for damage to goods; 184, petition of master for a survey, sale, etc., allowed; 187, for pilotage; 193, for freight.

Book third, 1726 to 1733, 5, libel against mate for error in bill of lading; 19, one against a man who had taken a borrowed boat which was driven to sea and lost; 10, libel by master against owners to compel an agreement that he should act as such, dismissed because not proved; 17, 70, 84, 99, surveys and orders of sale; builder of ship *in rem* for price, after delivery; 96, master for work on board; 106, for breach of contract for transportation of passengers; 112 "*for averidge*" *in rem*; 114, master and part owner for an account; 123, shipper against master for non-delivery; plea, jettison; sustained, and commissioner appointed to adjust the average.